HONG LEONG BANK BHD v. PP

COURT OF APPEAL, PUTRAJAYA
MD RAUS SHARIF PCA
TENGKU MAIMUN TUAN MAT JCA
ZABARIAH MOHD YUSOF JCA
[CRIMINAL APPEAL NO: B-09-317-11-2015]
23 AUGUST 2016

CRIMINAL PROCEDURE: *Forfeiture – Principles governing – Order for return of forfeited car with conditions – Appeal against order – Whether police had right to seize car – Purchaser in good faith for valuable consideration – Whether there was evidence of anything unlawful in hire purchase agreement or sale and purchase of car – Whether car fell under 'property alleged or suspected to have been stolen or found under circumstances which create suspicion of the commission of any offence …' under second limb of s. 413 of Criminal Procedure Code*

CRIMINAL PROCEDURE: *Appeal – Right of – Order for return of car seized by police – Whether order finally disposed of rights of parties – Whether order made in course and during hearing of criminal trial – Whether report forming basis of seizure of car by police was matter to be dealt with by civil court – Whether order pertaining to return of car was final order*

Zaharah binti Mohamad ('Zaharah') sold her motor car to one Jacqueline a/p Ponnusamy ('Jacqueline') for a consideration of RM175,000. After the payment of RM15,000, a change of ownership of the motor car was executed from Zaharah to Jacqueline. However, the balance purchase price of the same was never paid by Jacqueline to Zaharah. Despite not paying the balance purchase price of the car to Zaharah, Jacqueline subsequently sold the car to a second hand car dealer, Empire Motor World Sdn Bhd. The appellant ('HLBB') purchased the car from Empire Motor World Sdn Bhd, in good faith and for valuable consideration for and on behalf of its customer, Fong Kin Yew. The car was leased out to Fong Kin Yew on hire purchase terms pursuant to a hire purchase agreement. However, due to the non-payment by Jacqueline of the balance purchase price of the car, Zaharah lodged a police report and the case was classified as 'cheating' under s. 420 of the Penal Code by the police. Pursuant to the report lodged by Zaharah, the police seized the car, when it was in the possession of Fong Kin Yew, the hirer. Due to storage constraints, *vide* letter dated 3 June 2015, the police filed an application at the Criminal Magistrate's Court for the return of the car to HLBB pursuant to s. 413 of the Criminal Procedure Code ('CPC'). As a result, Zaharah, Fong Kin Yew and HLBB filed separate applications in the Magistrate's Court to claim for the car. The Magistrate dismissed the three applications. HLBB appealed to the High Court. The High Court Judge ('HCJ'), having made a finding that there was competing interest between 'public interest' and 'private interest', gave priority to the public interest and, pursuant to s. 413 of the CPC, ordered the return of the car to HLBB with

A conditions. Hence, the appeal by HLBB. The issues to be determined in the present appeal were: (i) whether Zaharah retained a right or lien over the car after it had changed ownership to Jacqueline and subsequently purchased by a HLBB in good faith and for valuable consideration for and on behalf of its client, Fong Kin Yew; (ii) if the answer was no, whether the police, in
B conducting its investigation on the report lodged by Zaharah as to the non-payment of the balance purchase price of the car, had the right to seize the car from the possession of HLBB and/or its customer, who had acquired title to the car lawfully; and (iii) in allowing the appeal by HLBB under s. 413 of the CPC for the return of the car to HLBB, which was not objected
C to by the prosecution, whether the High Court could impose conditions for the return of the same *ie*, by executing a bond and to produce the car as and when it is required in the future. At the outset, the prosecution raised a preliminary objection that the appeal was incompetent, in that, the order made under s. 413 of the CPC was not appealable.

D **Held (allowing appeal)**
Per Zabariah Mohd Yusof JCA delivering the judgment of the court:

(1) It is trite law that the right of appeal is not available against procedural ruling made by a subordinate court in the course of and during hearing of a criminal trial. Section 307(1) of the CPC provides for the right of
E appeal by any person who is dissatisfied with any judgment, sentence or order pronounced by any Magistrate's Court in a criminal case or matter to which he is a party where he may prefer an appeal to the High Court against that judgment, sentence or order in respect of any error in law or in fact or on the ground of the alleged excessive severity or of the
F alleged inadequacy of any sentence. (para 31)

(2) The order of the Magistrate was not made in the course of and during hearing of a criminal trial. It was made upon the application by the police for the return of the car which they had seized. The report which formed the basis for the seizure of the car by the police was the
G non-payment of the purchase price which was a matter to be dealt with by the civil courts. It did not involve rival or competing claims on the ownership of the car. Title and ownership of the car had been transferred and Zaharah no longer had title to the car. The title and ownership was with HLBB/hirer. Therefore, the order of the Magistrate and the HCJ
H pertaining to the return of the car was a final order. Consequently, the preliminary objection by the prosecution was baseless. (paras 32-34)

(3) The prosecution did not object to the application by the police for the return of the car to HLBB. Neither did the prosecution insist on any conditions to be imposed in the event the order for the return of the car
I to HLBB was made. Further, there was nothing to suggest nor any evidence to show anything unlawful regarding the hire purchase agreement or the sale and purchase of the car by HLBB from Empire Motor World Sdn Bhd. Everything was done in good faith and for

valuable consideration. Hence, the car did not fall under 'property alleged or suspected to have been stolen or found under circumstances which create suspicion of the commission of any offence ...' under the second limb of s. 413 of the CPC. (paras 35 & 39)

(4) It was not proved that HLBB or Fong Kin Yew was in possession of the car unlawfully at the point when the car was seized by the police. It was also in evidence and undisputed by the parties that the car was in the possession of Fong Kin Yew when the police seized it, which was sufficient to tilt the balance in favour of returning the car to HLBB. (paras 41 & 42)

(5) As the title of the car had already been transferred to Jacqueline, Zaharah, as the original owner of the car, lost her right of lien over the car pursuant to s. 53 of the Sale of Goods Act 1957. Zaharah's interest was on the balance purchase price of the car and not on the title or ownership of the car. Hence, there was no necessity for the police to hold on to the car as an excuse to be used as an exhibit. Since the car did not fall under the category as envisaged by s. 413 of the CPC, the condition that the car is to be produced as and when required by the court was unwarranted. The car should be returned to HLBB with no conditions attached. Therefore, the issues of law raised by the appellant were all answered in the negative. (paras 43 & 48-50)

(6) Zaharah's interest was on the balance purchase price of the car. Thus, it was erroneous to say that Zaharah would be left without remedy. She could still pursue her remedy in a civil claim against Jacqueline for the balance of the purchase price of the car. (para 44)

Bahasa Malaysia *Headnotes*

Zaharah binti Mohamad ('Zaharah') menjual keretanya kepada seorang yang bernama Jacqueline a/p Ponnusamy ('Jacqueline') bagi balasan sejumlah RM175,000. Selepas membayar RM15,000, pemindahan hak milik kereta dibuat oleh Zaharah kepada Jacqueline. Walau bagaimanapun, baki harga belian tidak pernah diselesaikan oleh Jacqueline kepada Zaharah. Walaupun tidak menyelesaikan baki harga belian kereta kepada Zaharah, Jacqueline kemudian menjual kereta tersebut kepada penjual kereta terpakai, Empire Motor World Sdn Bhd. Perayu ('HLBB') membeli kereta tersebut daripada Empire Motor World Sdn Bhd, dengan niat baik dan balasan bernilai untuk dan bagi pihak pelanggannya, Fong Kin Yew. Kereta tersebut dipajak kepada Fong Kin Yew atas terma-terma sewa beli menurut perjanjian sewa beli. Walau bagaimanapun, disebabkan Jacqueline tidak membayar baki harga belian kereta tersebut, Zaharah membuat laporan polis dan kes tersebut diklasifikasikan sebagai 'penipuan' di bawah s. 420 Kanun Keseksaan oleh pihak polis. Berikutan laporan yang dibuat oleh Zaharah, pihak polis merampas kereta tersebut semasa dalam milikan Fong Kin Yew, penyewa. Oleh sebab tempat penyimpanan terhad, melalui surat bertarikh 3 Jun 2015,

pihak polis memfailkan permohonan di Mahkamah Majistret Jenayah bagi pemulangan kereta tersebut kepada HLBB menurut s. 413 Kanun Tatacara Jenayah ('KTJ'). Berikutan itu, Zaharah, Fong Kin Yew dan HLBB memfailkan permohonan berasingan di Mahkamah Majistret untuk menuntut kereta tersebut. Majistret menolak ketiga-tiga permohonan tersebut. HLBB merayu ke Mahkamah Tinggi. Hakim Mahkamah Tinggi ('HMT'), setelah membuat dapatan bahawa terdapat kepentingan bercanggah antara 'kepentingan awam' dan 'kepentingan peribadi', memberikan keutamaan kepada kepentingan awam dan, menurut s. 413 KTJ, memerintahkan pemulangan kereta tersebut kepada HLBB dengan syarat. Oleh itu, rayuan ini oleh HLBB. Isu-isu yang perlu diputuskan dalam rayuan ini adalah: (i) sama ada Zaharah mengekalkan hak atau lien terhadap kereta tersebut selepas pemindah milikan kepada Jacqueline dan kemudian dibeli oleh HLBB dengan niat baik dan bagi balasan bernilai untuk dan bagi pihak pelanggannya, Fong Kin Yew; (ii) jika jawapannya ialah tidak, sama ada pihak polis dalam menjalankan siasatan ke atas laporan yang dibuat oleh Zaharah bagi kegagalan membayar baki harga belian kereta tersebut, berhak merampas kereta tersebut dari milikan HLBB dan/atau pelanggannya, yang telah memperoleh hak milik kereta secara sah; dan (iii) dalam membenarkan rayuan oleh HLBB di bawah s. 413 KTJ bagi pemulangan kereta tersebut kepada HLBB yang tidak dibantah oleh pihak pendakwaan, sama ada Mahkamah Tinggi boleh mengenakan syarat-syarat bagi pemulangan kereta tersebut, iaitu, dengan memeterai bon dan mengemukakan kereta tersebut pada bila-bila masa ia diperlukan di masa hadapan. Di awal perbicaraan, pihak pendakwaan membangkitkan bantahan awalan bahawa rayuan ini tidak berkompeten di mana perintah yang dibuat di bawah s. 413 tidak boleh dirayu.

Diputuskan (membenarkan rayuan)

Oleh Zabariah Mohd Yusof HMR menyampaikan penghakiman mahkamah:

(1) Adalah undang-undang matan bahawa tiada hak merayu terhadap kaedah prosedur yang dibuat oleh mahkamah rendah semasa perjalanan dan semasa perbicaraan jenayah. Seksyen 307(1) KTJ memperuntukkan hak merayu oleh seseorang yang tidak berpuas hati dengan mana-mana penghakiman, hukuman atau perintah yang diberikan oleh Mahkamah Majistret dalam sesuatu kes atau perkara jenayah di mana dia adalah seorang pihak yang mana dia mungkin membuat rayuan kepada Mahkamah Tinggi terhadap penghakiman, hukuman atau perintah berkaitan dengan apa-apa kekhilafan dari segi undang-undang atau fakta atau atas alasan kekerasan melampau atau dakwaan kekurangan apa-apa hukuman.

(2) Perintah Majistret tidak dibuat dalam perjalanan atau semasa perbicaraan jenayah. Ia dibuat selepas permohonan pihak polis bagi pemulangan kereta yang mereka rampas. Laporan yang membentuk asas

perampasan kereta oleh pihak polis adalah kegagalan membayar baki harga belian yang merupakan perkara yang perlu diputuskan oleh mahkamah sivil. Ia tidak melibatkan tuntutan bersaingan atau bertentangan atas hak milik kereta itu. Hak milik dan milikan kereta telah dipindahkan dan Zaharah tidak lagi mempunyai hak milik atas kereta tersebut. Hak milik dan milikan kereta adalah dengan HLBB/ penyewa. Oleh itu, perintah Majistret dan HMT berkaitan dengan pemulangan kereta tersebut adalah perintah muktamad. Berikutan itu, bantahan awalan pihak pendakwaan tidak berasas.

(3) Pihak pendakwaan tidak membantah permohonan pihak polis untuk pemulangan kereta kepada HLBB. Juga, pihak pendakwaan tidak menekankan pengenaan apa-apa syarat jika perintah bagi pemulangan kereta kepada HLBB dibuat. Selanjutnya, tiada apa-apa yang mencadangkan atau keterangan untuk menunjukkan sesuatu yang tidak sah dari segi undang-undang atau jual beli kereta oleh HLBB daripada Empire Motor World Sdn Bhd. Kesemuanya dibuat dengan niat baik dan bagi balasan bernilai. Dengan itu, kereta itu tidak terangkum di bawah 'harta yang didakwa atau diragui telah dicuri atau ditemui di bawah hal keadaan yang membentuk kecurigaan perlakuan sesuatu kesalahan ...' di bawah bahagian kedua s. 413 KTJ.

(4) Tidak dibuktikan bahawa HLBB atau Fong Kin Yew memiliki kereta tersebut secara tidak sah pada bila-bila masa apabila kereta itu dirampas oleh pihak polis. Juga, terdapat keterangan dan tidak dipertikaikan oleh pihak-pihak bahawa kereta tersebut berada dalam milikan Fong Kin Yew semasa pihak polis merampasnya, yang adalah mencukupi untuk menjungkitkan imbangan memihak kepada pemulangan kereta tersebut kepada HLBB.

(5) Oleh sebab hak milik telah dipindahkan kepada Jacqueline, Zaharah, sebagai pemilik asal kereta tersebut, kehilangan hak atau lien ke atas kereta tersebut menurut s. 53 Akta Jualan Barangan 1957. Kepentingan Zaharah adalah atas baki harga belian kereta dan bukan atas hak milik atau milikan kereta tersebut. Oleh itu, tiada keperluan bagi pihak polis menahan kereta itu sebagai alasan untuk digunakan sebagai ekshibit. Oleh sebab kereta itu tidak terangkum dalam kategori yang dibayangkan oleh s. 413 KTJ, syarat bahawa kereta itu dikemukakan pada bila-bila masa diperlukan oleh mahkamah adalah tidak wajar. Kereta tersebut mesti dipulangkan kepada HLBB tanpa syarat. Oleh itu, isu-isu undang-undang yang dibangkitkan oleh perayu kesemuanya dijawab secara negatif.

(6) Kepentingan Zaharah adalah atas baki harga belian kereta. Oleh itu, adalah khilaf untuk menyatakan bahawa Zaharan tiada remedi. Dia masih boleh mendapatkan remedi dalam tuntutan sivil terhadap Jacqueline bagi baki harga belian kereta tersebut.

Case(s) referred to:
SKI Leasing Sdn Bhd v. PP & Ors [1996] 1 LNS 86 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 3, 50(2)
Criminal Procedure Code, ss. 20, 307(1), 413
Hire-Purchase Act 1967, s. 7(1)(a)
Penal Code, s. 420
Sale of Goods Act 1957, ss. 53, 55

For the appellant - Satish Nair & R Kathir; M/s Satish Alli & Assocs
For the respondent - Nadia Hanim Mohd Tajuddin; DPP

[Editor's note: Appeal from High Court, Shah Alam; No: 41(ORS)-2-08-2015 (overruled).]

Reported by S Barathi

JUDGMENT

Zabariah Mohd Yusof JCA:

[1] The appeal came before us from Hong Leong Bank Berhad (HLBB) against the decision of the High Court Judge Shah Alam dated 15 September 2015 who, pursuant to s. 413 of the Criminal Procedure Code, ordered the return of a motorcar Audi Model A5 ABA registration number KDV 34 ("the car") to HLBB with conditions ie:

(i) HLBB shall deposit a bond with one surety in the amount of RM5,000; and

(ii) the car is to be produced to the court as and when it is required.

[2] The decision of the High Court Judge was pursuant to an appeal filed by HLBB against the decision of the Magistrate in the Magistrate's Court Kuala Kubu, Selangor, who heard the application filed by HLBB for the return of the car to HLBB pursuant to s. 413 of the Criminal Procedure Code. The Magistrate dismissed the application by HLBB citing reason as the presence of competing claims, which could only be determined at full trial.

[3] HLBB had obtained leave to appeal (pursuant to s. 50(2) of the Courts of Judicature Act 1964) against the decision of the High Court Judge delivered on 15 September 2015. The appeal before us is on issues of law which arose in the High Court in Shah Alam on the following questions:

(i) Sama ada seorang penjual, kenderaan yang tidak dibayar

keseluruhan harga jualan (unpaid seller) mengekalkan (retain) hak atau lien ke atas kenderaan tersebut setelah ianya ditukar hak milik ke atas nama pembeli dan kemudiannya dibeli secara suci hati oleh institusi kewangan (financial institution) bagi pihak pelanggannya dan bagi balasan berharga dan seterusnya disewakan kepada pelanggan tersebut secara sewa-beli.

(ii) Sekiranya jawapan kepada soalan (i) di atas adalah dalam negatif, sama ada dalam melakukan penyiasatan ke atas repot yang dibuat oleh penjual tersebut berkenaan ketidakbayaran keseluruhan harga jualan, adakah wajar bagi pihak Polis untuk merampas kenderaan tersebut dari milikan institusi kewangan atau pelanggannya yang merupakan penuntut hak milik dan penyewa-beli masing-masing dan menjadikannya sebagai barang kes walaupun pihak Polis mengetahui atau sepatutnya mengetahui bahawa kedua-dua pihak tersebut telah memperolehi (acquired) hak milik (title) dan kepentingan masing-masing ke atas kenderaan tersebut secara suci hati dan bagi balasan berharga; dan

(iii) Dalam membenarkan rayuan institusi kewangan sebagai penuntut hak milik untuk pengembalian kenderaan yang dijadikan barang kes, di bawah seksyen 413 Kanun Tatacara Jenayah (Akta 593) ("KTJ"), yang tidak dibantah atau dikenakan apa-apa syarat oleh Pendakwa Raya, adakah wajar bagi Mahkamah Tinggi untuk mengenakan syarat-syarat untuk pengembalian bahawa institusi kewangan tersebut melaksanakan bon dan untuk mengemukakan kenderaan tersebut apabila diarahkan oleh pihak Polis.

Background

[4] The facts are not in dispute.

[5] Zaharah binti Mohamad ("Zaharah") sold her motorcar, registration number KDV 34 to one Jacqueline a/p Ponnusamy and/or under her business entity by the name of IZ Pakatjaya Restu ("Jacqueline") at a consideration of RM175,000.

[6] After the payment of RM15,000, a change of ownership of the motorcar was executed from Zaharah to Jacqueline. However, the balance purchase price of the same was never paid by Jacqueline to Zaharah.

[7] Despite not paying the balance purchase price of the car to Zaharah, Jacqueline subsequently sold the car to a second hand car dealer, Empire Motor World Sdn Bhd.

[8] HLBB then purchased the car from Empire Motor World Sdn Bhd, in good faith and for valuable consideration for and on behalf of its customer, Fong Kin Yew. The car was leased out to Fong Kin Yew on hire purchase terms pursuant to a hire purchase agreement dated 12 March 2015.

[9] Due to the non-payment by Jacqueline of the balance purchase price of the car, Zaharah lodged a police report, Bukit Sentosa Report No. 2175/15 on 10 March 2015. The case was classified as "cheating" under s. 420 of the Penal Code by the police.

[10] Zaharah alleged that the car was sold to Jacqueline at the price of RM175,000. Jacqueline paid RM15,000 and there was a change of ownership of the car executed. However the balance purchase price was never paid by Jacqueline to Zaharah.

[11] Investigation by the police confirmed that the car was sold by Jacqueline to a second hand car dealer, Empire Motor World Sdn Bhd.

[12] Pursuant to the report lodged by Zaharah, the police seized the car on 8 April 2015 when it was in the possession of Fong Kin Yew, the hirer.

[13] It is not disputed that until the decision of the Magistrate, there has not been any charge preferred against anyone.

The Hearing At The Magistrates Court

[14] Due to storage constraints by the police, *vide* letter dated 3 June 2015, the police filed an application at the criminal Magistrate's Court at Kuala Kubu Baru for the return of the car to HLBB pursuant to s. 413 of the Criminal Procedure Code.

[15] As a result, three individuals filed separate applications in the Magistrate's Court to claim for the car. They were:

(i) Zaharah (Case No. 89-14-2015);

(ii) Fong Kin Yew (Case No. 89-15-2015);

(iii) HLBB (Case No. 89-16-2015).

[16] The three applications for the return of the car were heard together on 3 June 2015 at the Magistrate's Court and the Magistrate dismissed the three applications. Her reasons are as follows:

> Setelah mendengar keterangan daripada semua pihak-pihak yang menuntut, Mahkamah menolak permohonan pengembalian barang kes di bawah Sek. 413 KPJ memandangkan terdapat isu tuntutan hak milik pemilikan barang kes, iaitu sebuah motorcar, Nombor Penclaftaran KDV 34.
>
> Tuntutan hak milik kenderaan hanya dapat diputuskan selepas perbicaraan penuh di Mahkamah jika ada pertuduhan oleh pihak pendakwaan.

[17] HLBB then filed an appeal on the decision of the Magistrate to the High Court.

[18] Zaharah and Fong Kin Yew did not file any appeal against the decision of the Magistrate. Therefore, for purposes of our appeal herein we are only concerned with the application by HLBB.

The Hearing At The High Court

[19] The learned High Court Judge in his grounds took judicial notice that the case was classified under s. 420 of the Penal Code whereby investigation was still pending.

[20] Essentially, the learned High Court Judge was of the view that the case under s. 420 was still under investigation and that those responsible have not been brought to justice. We presumed what he meant is that those responsible for "cheating" has not been charged. This, he termed it as "public interest" when he said in his grounds of judgment as:

> Ini adalah kepentingan umum yakni kewajipan untuk membicarakan sesuatu kesalahan jenayah demi keadilan masyarakat.

[21] The learned judge also took into account the claim by HLBB who, he agreed was a purchaser in good faith and for valuable consideration, hence HLBB has an interest on the car which he categorised as "private interest".

[22] Thus the learned judge made a finding that there was competing interest between "public interest" and "private interest". Following thereto, the learned judge gave priority to the public interest: Hence the necessity of him imposing the conditions when he made the order to return the car to HLBB. The learned judge was of the view that:

> Sekiranya dikembalikan kepada perayu secara mutlak, terdapat kemungkinan yang kereta ini tidak dapat dikesan kerana mungkin perayu akan melupus atau menjual kereta tersebut kepada orang lain. Kedua, tidak boleh dilupakan juga akan kepentingan pemilik asal kenderaan ini iaitu Zaharah Binti Mohamad yang kononnya di "tipu" oleh IZ Pakatjaya Restu yang mana wujudnya hutang yang tertunggak oleh IZ Pakatjaya Restu kepada Zaharah Binti Mohamad. Sekiranya kereta ini dikembalikan kepada perayu tanpa syarat, bagaimana pula dengan kepentingan Zaharah? Hak Zaharah untuk memfailkan tuntutan sivil terhadap IZ Pakatjaya. Restu tidak boleh diketepikan dan apabila ini berlaku, kereta tersebut pasti akan menjadi barang kes yang sangat penting ...

Issues

[23] The issues to be determined are as follows:

(i) whether Zaharah (an unpaid seller) retain a right or lien over the car after it had changed ownership to Jacqueline (the purchaser) and subsequently purchased by a HLBB (financial institution) in good faith and for valuable consideration for and or behalf of its client (Fong Kin Yew) who took the car on hire purchase;

(ii) if the answer is no, whether the police in conducting its investigation on the report lodged by Zaharah as to the non-payment of the balance purchase price of the car, has the right to seize the car from the possession of HLBB and/or its customer, who have acquired title to the car lawfully;

(iii) in allowing the appeal by 1-113B under s. 413 of the Criminal Procedure Code for the return of the car to HLBB, which was not objected to by the prosecution, whether the High Court can impose conditions for the return of the same ie by executing a bond and to produce the car as and when it is required in future.

A **Findings**

Preliminary Objection By The Prosecution

[24] The prosecution raised as a preliminary objection that the appeal before us is incompetent in that, the order made under s. 413 of the Criminal
B Procedure Code is not appealable.

[25] It was submitted by the prosecution that s. 50 of the Courts of Judicature Act 1964 (CJA) read together with s. 3 of the same where it defines "decision" to mean "judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or
C matter which does not finally dispose of the rights of the parties."

[26] The prosecution submitted that the scope of the term "decision" in s. 3 of the CJA reveals that its definition does not only extend to the types of "judgments or orders" which can be termed as "interlocutory", but also to a judgment or order which is not final.

D

[27] Hence it was argued that if a judgment or order is not final, ie does not finally dispose of the rights of the parties in the trial, then it would not fall within the definition of the word "decision" under s. 3 of the CJA, and thus not appealable.

E **[28]** In relation to criminal cause or matter, the word is confined, broadly speaking, to those final decisions of a court which affect parties to the proceedings in respect of their person or property. Whether it is a judgment, decision or order pronounced by a court, there must be an element of finality which has the effect of finally disposing of their rights before there can be
F an appeal.

[29] The prosecution submitted that in this case which is before the court, HLBB, the appellant, as the financier is pursuing their rights over the seized car which is currently pending investigation for an offence under s. 420 of the Penal Code. It was submitted by the prosecution that the said
G order by the High Court Judge pertaining to the return of the car with conditions, was not a final order hence is not appealable. The prosecution was of the view that the appeal by the appellant is therefore incompetent.

[30] The learned judge in his grounds cited the case of *SKI Leasing Sdn Bhd v. PP & Ors* [1996] 1 LNS 86; [1996] 5 MLJ 184, as an authority to say that
H orders under s. 413 is appealable.

[31] It is trite law that the right of appeal is not available against procedural ruling made by a subordinate court in the course of and during hearing of a criminal trial. Section 307(1) of the Criminal Procedure Code provides for the right of appeal by any person who is dissatisfied with any judgment,
I sentence or order pronounced by any Magistrate's Court in a criminal case or matter to which he is a party where he may prefer an appeal to the High

Court against that judgment, sentence or order in respect of any error in law or in fact or on the ground of the alleged excessive severity or of the alleged inadequacy of any sentence.

[32] As far as the case that is before us is concerned, the order was not made by the Magistrate in the course of and during hearing of a criminal trial. It was made upon the application by the police for the return of the car which they have seized. The report which formed the basis for the seizure of the car by the police was, the non-payment of purchase price by Jacqueline to Zaharah, which is a matter to be dealt with by the civil courts. It does not involve rival or competing claims on the ownership of the car. Title and ownership of the car had been transferred. Zaharah no longer has title to the car. The title and ownership is with HLBB/hirer.

[33] Therefore, the order of the Magistrate and the High Court Judge pertaining to the return of the car is a final order.

[34] Consequently, the preliminary objection by the prosecution is baseless and we proceeded to hear the appeal on its merits.

Merits Of The Appeal

[35] It is to be noted at the outset that the prosecution did not object when the application by the police was heard before the (Magistrate's Court for the return of the car to HLBB. Neither did the prosecution insists on any conditions to be imposed in the event the order for the return of the car to HLBB was made.

[36] The application by the police to the Magistrate was made under s. 413 of the Criminal Procedure Code for the car to be returned to HLBB. Section 413 provides that:

> (1) The seizure or finding by any police officer of property taken under section 20 or **alleged or suspected to have been stolen or found under circumstances which create suspicion of the commission of any offence** shall be immediately reported to a Magistrate, who shall make such order as he thinks fit respecting the delivery of the property **to the person entitled to the possession of it**, or, if that person cannot be ascertained, respecting the custody and production of the property.
>
> (2) If the person so entitled is known the Magistrate may order the property to be delivered to him on such conditions, if any, as the magistrate thinks fit, and shall in that case cause a notice to be served on that person informing him of the terms of the order and requiring him to take delivery of the property within such period from the date of the service of the notice (not being less than forty-eight hours) as the Magistrate may in the notice prescribed. (emphasis added)

[37] The first limb of s. 413 talks about seizure of property by the police under s. 20 which is not relevant to our case, as it talks about seizure of property from arrested persons. What is more important is the second limb

which states "seizure or finding by any police officer of property alleged or suspected to have been stolen or found under circumstances which create suspicion of the commission of any offence ...".

[38] Applying that provision to our case, the car which is the subject matter in our case, was seized when it was found in the possession of Fong Kin Yew.

[39] The car was purchased by HLBB from Empire Motor World Sdn Bhd, for and on behalf for it's clients, Fong Kin Yew who took it on hire purchase pursuant to a hire purchase agreement with HLBB3. HLBB had paid the full purchase price to Empire Motor World Sdn Bhd. There was nothing to suggest nor any evidence to show anything unlawful of the hire purchase agreement or the sale and purchase of the car by HLBB from Empire Motor World Sdn Bhd. Everything was done in good faith and for valuable consideration. Hence the car in our case does not fall under "property alleged or suspected to have been stolen or found under circumstances which create suspicion of the commission of any offence ... ".

[40] In determining for an application for the return of property under s. 413 of the CPC, what the Magistrate has to consider are:

(i) who is entitled to possession of the property at the time when it had been seized by the police; and

(ii) where it appears that the police had seized the property from a person who has not been shown to have committed any offence with regards to the property,

then the Magistrate may make an order for the car to be returned to the person last in possession. The Magistrate should not delve into the issue of title or ownership, which would be determined in the civil court.

[41] Coming back to the facts in our case, it has not been proved that HLBB or Fong Kin Yew was in possession of the car unlawfully at the point when the car was seized by the police.

[42] It was also in evidence and undisputed by parties that the car was in the possession of the hirer, Fong Kin Yew when the police seized it. This is enough to tilt the balance in favour of returning the car to HLBB. In *SKI Leasing Sdn Bhd v. PP & Ors* (*supra*) where it was held at p. 190 that:

> Even assuming again that this tampering should not tilt the case in favour of granting possession to the appellant, then the fact that the appellant was last in possession was enough to tilt the balance in favour of the appellant, especially so when the second and third respondent was not able to establish that the possession by the appellant just before seizure by the police was unlawful, it being the law that the vehicles should normally be returned to the person from whom they were seized.

[43] In addition, it is not in dispute that the title of the car had been transferred to Jacqueline. Jacqueline had subsequently – sold the car to Empire Motor World Sdn Bhd which was then purchased by HLBB for and on behalf of Fong Kin Yew in good faith and valuable consideration.

Hence Zaharah, as the original owner of the car, lost her right of lien over the car pursuant to s. 53 of the Sale of Goods Act 1957 which provides that:

> Effect of sub sale or pledge by buyer
>
> (1) Subject to this Act the unpaid seller's right of lien or stoppage in transit is not affected by any sale or any other disposition of the goods which the buyer may have made unless the seller has assented thereto;
>
> Provided that where a document of title to goods has been issued or lawfully transferred to any person as buyer or owner of the goods and that person transfers the document to a person who takes the documents in good faith and for consideration, then, if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien or stoppage in transit is defeated, and, if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or stoppage in transit can only be exercised subject to the rights of the transferee.
>
> (2) Where the transfer is by way of pledge, the unpaid seller may require the pledgee to have the amount secured by the pledge satisfied in the first instance, as far as possible, out of any other goods or securities of the buyer in the hands of the pledge and available against the buyer.

[44] The learned judge in his grounds in justifying the imposition of the conditions in making the order of returning the car to HLBB, said that in the event that the car was disposed by HLBB, Zaharah "will be left behind to lick his wound unattended."

This is erroneous, as firstly, the transfer of the title of the car was completed. There has been acceptance of the car by Jacqueline. The contract for the sale between Zaharah and Jacqueline has been completed and there, is no question of the car being returned back to Zaharah.

The only issue left is the non-payment of the balance of the purchase price of the car when the car was sold to Jacqueline. Zaharah's interest is on the balance purchase price of the car, not on the title or ownership of the car. It is thus erroneous to say that she will be left without remedy, as she could still pursue her remedy in a civil claim against Jacqueline for the balance of the purchase price of the car. For this, s. 55 of the Sale of Goods Act 1957 is relevant wherein it states that:

> 55. Suit for price
>
> (1) Where under a contract of sale the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may sue him for the price of the goods.

[45] The prosecution has no basis to retain the car continuously whilst investigation was purportedly pending pertaining to the police report lodged by Zaharah. The real issue of dispute as contained in the police report, was between Zaharah and Jacqueline for the non-payment of the balance purchase price of the car and not the ownership or title of the car which had been transacted in good faith and for valuable consideration.

[46] The longer the detention of the car by the police, not only will it affect the peaceful enjoyment of the use of the car by Fong Kin Yew (refer to s. 7(1)(a) of the Hire-Purchase Act 1967) but also will result in the depreciation of value of the car which will cause loss to HLBB and Fong Kin Yew who are not the parties at fault in this dispute.

[47] Therefore, the unpaid seller ie Zaharah does not retain her right of lien over the car after the ownership and title to the car had passed to Jacqueline.

[48] Hence there is no necessity for the police to hold on to the car as an excuse to be used as an exhibit, as Zaharah, the author of the police report does not have any interest in the car.

[49] Consequently, the car should be returned to HLBB with no conditions attached. The learned judge had committed an error when he ordered that the car to be returned to HLBB with conditions, one of which is that the car is to be produced as and when required by the court. Such condition is unwarranted, reason being that the car does not fall under the category of "property taken under s. 20 or alleged or suspected to have been stolen or found under circumstances which create suspicion of the commission of any offence ..." as envisaged under s. 413 of the Criminal Procedure Code.

[50] Therefore the answers to the issues of law raised by the appellant are as follows:

(i) negative;

(ii) negative; and

(iii) negative.

[51] The appeal is allowed. The car is to be released forthwith to HLBB, the appellant with no conditions attached.